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No. 05-912

FILED

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SUPREME COURT, U.S.

**In The
Supreme Court of the United States**

**ESTATE OF MARY LOWE, BY ROBERT HARRIS,
COOK COUNTY PUBLIC GUARDIAN AND
SUPERVISED ADMINISTRATOR,**

Petitioner,

v.

**APEX TAX INVESTMENTS, INC.
AND JOHN HERNDON,**

Respondents.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of Illinois**

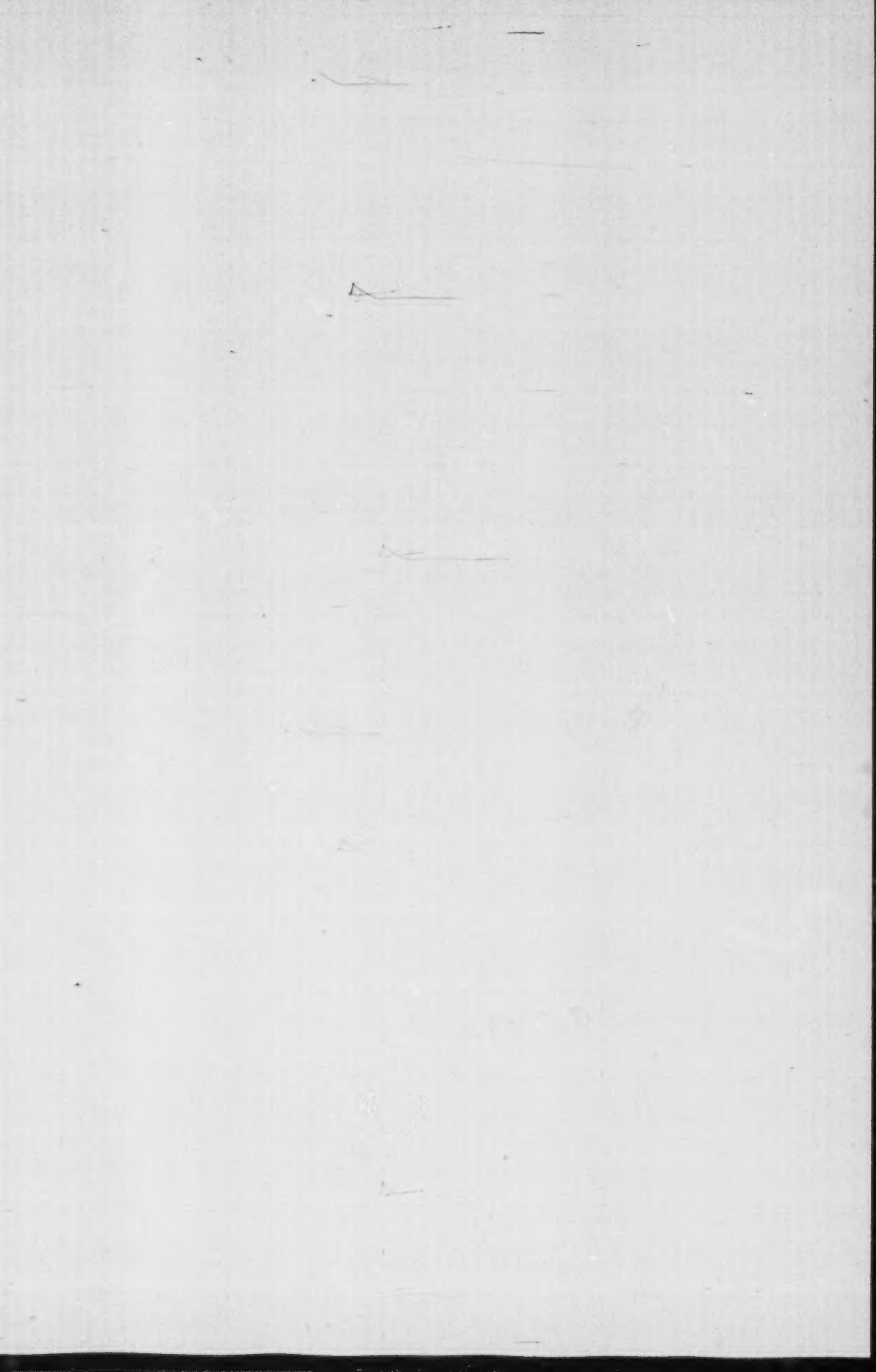
BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether, before real property is taken from its owner, the person charged with giving notice in a delinquent tax sale proceeding is required by the Due Process Clause of the Fourteenth Amendment to take continual and additional steps to locate the property owner, above and beyond the statutory requirements, after mailed notice has been returned undelivered?

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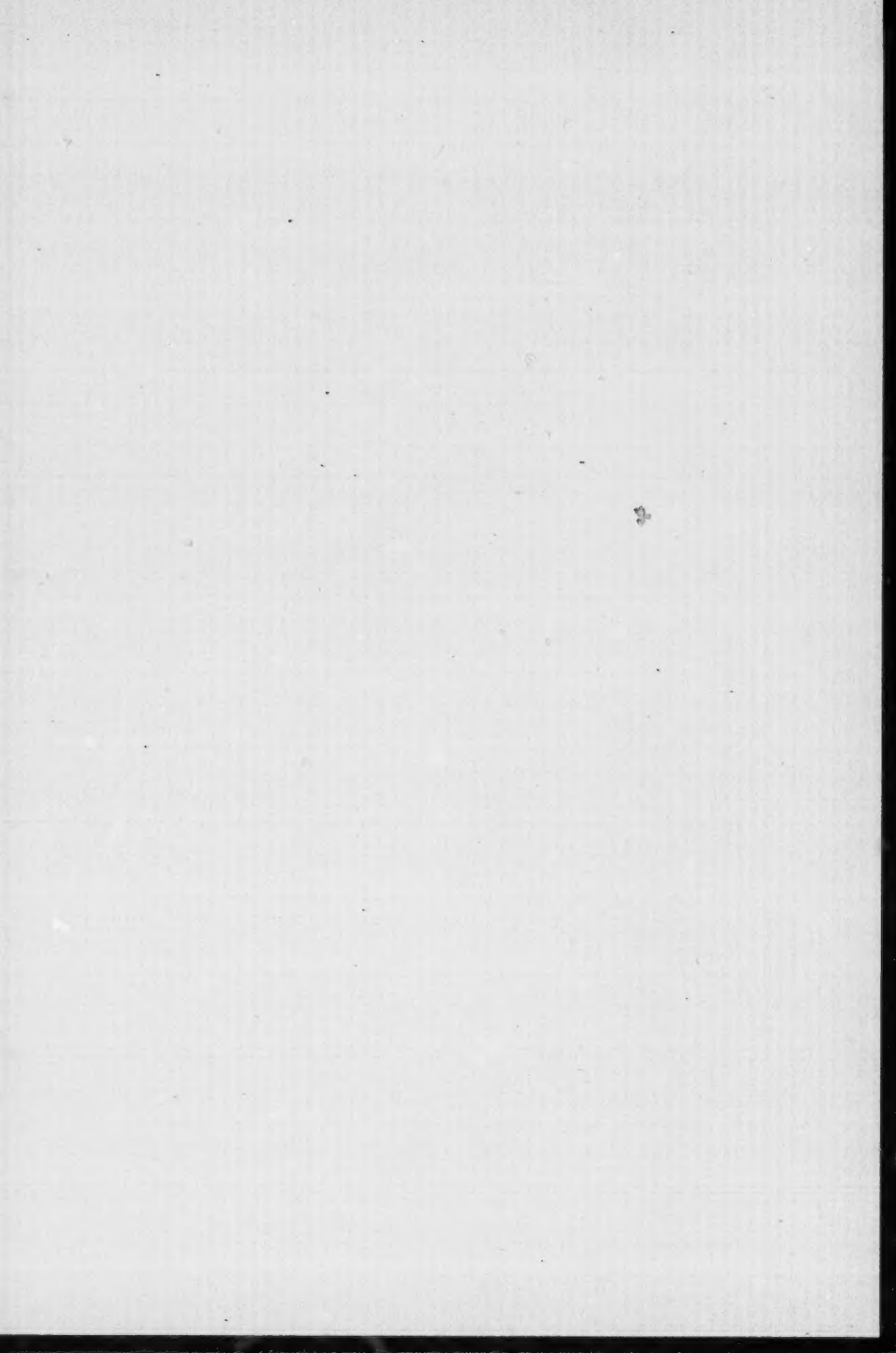
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STATEMENT OF CASE

On March 3, 2003, Apex Tax Investments ("Apex"), purchased the property of Mary Lowe ("Lowe") located at 13250 S. Riverdale, Chicago, Illinois (the "Property"), at a tax sale for the 1991 delinquent real estate taxes. On October 5, 2005, Apex filed its Petition For Tax Deed. Lowe's right of redemption expired on February 21, 1996. (C 2-4) Thereafter, Apex undertook to notify Lowe of the tax proceedings, and her right to redemption, in accordance with state law. Specifically, in accordance with 35 Ill. Comp. Stat. 200/22-10 through 22-25, Apex arranged for notice to be given through publication in a Cook County newspaper, and through the Circuit Court Clerk who sent notice by certified mail to Lowe at the Property address. Apex also arranged for the Cook County Sheriff to personally serve Lowe with notice at the Property address. The Cook County Sheriff was unable to serve Lowe at the Property (C 11-13), and in accordance with state law the Cook County Sheriff sent the notice to Lowe by certified mail at her Property address. (C 54-55) All of the notices sent to Lowe by certified mail were returned undelivered. (C 15-16, 54, 547; SRII 65-66)

When no redemption had been made, Apex filed its Application For Tax Deed on March 6, 1996. (C 18) After a hearing was held, the trial court entered an order on May 20, 1996, granting Apex's application and directing the County Clerk to issue a tax deed to Apex. (C 568-69)

On December 6, 1996, Apex executed a contract to sell the Property to John Herndon ("Herndon"). The contract terms provided that the purchase price would be paid by installments through March 4, 1999 at which time Apex

would tender a special warranty deed to Herndon. (C 90-91)

On September 5, 1997, Lowe's sons filed a petition to have the Property restored to their mother, arguing that their mother suffered from mental illness and was unable to carry on her affairs. (C 23-24) The trial court appointed the Cook County Public Guardian ("Public Guardian") as Lowe's attorney and guardian *ad litem*. (C 541-44) On November 10, 1997, the Public Guardian filed a Petition To Set Aside Tax Deed and later filed an amended petition on April 17, 1998. In its petition, the Public Guardian argued that Apex's tax deed petition should be set aside because Apex did not comply with the statutory notice provisions and that Lowe's right to due process had been violated. More specifically, the Public Guardian contended that Apex had actual knowledge that Lowe was hospitalized during the statutory notice period when Apex attempted to serve Lowe with notice of the tax deed proceedings. The Public Guardian further asserted that because of Lowe's mental illness, that even if Lowe had received notice of the tax deed proceedings, it would not have been proper because the notice did not satisfy her constitutional right to due process. (C 29-32; C 46-71)

Apex and Herndon filed answers to the Public Guardian's amended petition on March 8, 2000. (C 386-91; C397-401) An evidentiary hearing on the amended petition was held on February 20, 2002. (SR11 18-52) The Public Guardian called psychiatrist Dr. Bernard Rubin as a witness to testify as to his opinion of Lowe's mental capacity. Dr. Rubin testified that Lowe suffered from a severe mental disorder from January 1995 through October 1996, such that any notice sent to her during this

period of time would not have been understood by her. (SRII 18, 21-26, 31, 49, 104-105; 96-126)

The Public Guardian also called Lowe's postal carrier Jewel Hightower to testify on the notices mailed to Lowe by the Circuit Court Clerk and the Cook County Sheriff. (SRII 53-99) Ms. Hightower testified that she had personal knowledge of Lowe's mental illness and that her practice was to hold mail for Lowe at the post office when she was hospitalized for her mental illness. Ms. Hightower further testified that when she saw the Cook County Sheriff's certified letter to Lowe she wrote on the envelope the letters "JHT" (her initials), the numbers "2719" (her postal route) and the words "Person is Hospitalized." (C 54; SRII 66-70, 79) Ms. Hightower then testified that she returned the undelivered certified letter to the Cook County Sheriff. (C 15, 54; SRII 65-66)

Apex did not present any evidence at the hearing. John Herndon did not present any evidence at the hearing.

On April 9, 2002, the trial court entered an order denying the Public Guardian's amended petition to set aside the tax deed. The trial court ruled that while it found Lowe was incompetent at the time the notices were sent by Apex, Lowe was not denied her right to due process. The trial court held that Apex did not have knowledge of Lowe's incompetency and that Apex did not obtain its tax deed by fraud or deception. (SRIII 3-21)

The Public Guardian appealed the trial court's decision. On appeal to the Illinois Appellate Court, the Public Guardian argued that the trial court had erred in its decision to deny the amended petition to set aside the tax deed. The Public Guardian presented three issues to the

Illinois Appellate Court: (1) Whether purported notice to a mentally incompetent person is ever sufficient; (2) Whether Apex knew or should have known that Lowe was incompetent and therefore Apex's notice was insufficient; and (3) Whether Apex exercised due diligence in attempting to notify Lowe or whether instead Apex's actions constituted fraud and deception.

The Illinois Appellate Court reviewed the issues and arguments that were presented by the Public Guardian and Herndon. The Illinois Appellate Court affirmed the trial court's decision and held that Lowe had not been deprived of her right to due process.

The Public Guardian appealed this decision to the Illinois Supreme Court. The Public Guardian presented the same three issues to the Illinois Supreme Court.

The Illinois Supreme Court reviewed the issues and arguments that were presented by the Public Guardian and Herndon. The Illinois Supreme Court affirmed the Illinois Appellate Court's decision and held that Lowe had not been deprived of her right to due process.

ARGUMENT

The issuance of tax deeds in Illinois is governed by the Illinois Property Tax Code (35 ILCS 200/1 et seq.) The Illinois Property Tax Code specifically provides that the county collector may place properties that are delinquent in the payment of real estate taxes up for sale. A buyer of the property at such sale will receive a certificate of purchase that represents a lien on the property until

either there is a redemption by the owner of the property, or the tax certificate holder obtains a tax deed.

There is a statutorily mandated redemption period in which the owner of the property, or other interested person, may remove the lien and have the tax certificate voided upon payment of the tax arrearage and other costs. If the redemption period expires, without such payment, the tax certificate holder can seek a court order to have the county collector issue a tax deed upon compliance with statutory procedures.

Specifically, in order for the tax certificate holder to obtain a tax deed, he must file, within five months but not less than three months prior to the expiration of the redemption period, a petition with the court for an order issuing the tax deed. Within this same time period, the tax certificate holder must serve notice to the property owner of the redemption period expiration date and the tax certificate holder's intent to obtain a tax deed. Upon the failure of the property owner to redeem, and a showing of compliance with the notice requirements to the trial court, the tax certificate holder may be granted his tax deed.

In its Petition For Writ Of Certiorari, the Public Guardian does not argue that Apex failed to comply with the state law procedures in obtaining its tax deed. Instead, the Public Guardian is arguing that the constitutional right to due process requires the person charged with giving notice to undertake additional measures, beyond what the statute mandates, when a notice is returned undelivered.

The Illinois Supreme Court has long ago established that the Illinois Property Tax Code notice provisions are constitutional and meet the requirements for due process.

See *Rosewell v. Chicago Title & Trust Co.*, 459 N.E. 2d 966 (1984). The principle of due process was eloquently defined by the U.S. Supreme Court many years ago in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). As stated in *Mullane*, due process requires

"Notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections. . . . But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the Constitutional requirements are satisfied. . . . The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected . . . or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes." *Mullane*, 339 U.S. 314-15.

Thus, due process is measured upon the reasonableness of the method employed and based upon the circumstances that exist in the case.

Apex employed the statutory method of providing notice to Lowe. That method has been deemed constitutional by the courts and under the circumstances was reasonably regarded by Apex as the appropriate means to ensure notice was given. The legislature has not enacted any laws that place additional obligations upon a tax deed petitioner.

To the contrary, the Illinois Appellate Court has addressed the issue of whether due diligence requires a tax deed petitioner to update his search during the statutory notice period and has stated

"A judicial determination that a tax purchaser is required to repeat his search notification procedures throughout the notice period would substantially alter the obligations imposed by sections 236 and 266 of the Revenue Act, which do not require that notice (or inquiry into who is entitled to such notice) be conducted on the last day of the two-month period, thus, implying that even inquiry and notice on the first day of the notice period would be sufficient. The imposition of additional requirements on a tax petitioner requires modification of the statute, which is a legislative rather than a judicial prerogative." See *In re Application of County Collector*, 581 N.E. 2d 367 (1991).

The *Ohr* Court's decision explicitly interprets the statutory requirement of due diligence to be satisfied by one search. That Court further holds that notices based upon that one search are sufficient to satisfy the diligence obligations imposed upon the tax deed petitioner.

Thus, a crucial consideration for determining the sufficiency of notices sent in a tax deed proceeding, and whether due process has been given, is the facts or information which the tax deed petitioner knows at the time that said petitioner attempts to serve the statutory notices. Actual knowledge is the standard recognized by the courts.

Based on the facts in the record, Apex complied with the statutory notice requirements by ascertaining the name of Lowe, locating her last known address, and attempting to serve her at the last known address. The record contains no evidence that Apex had any knowledge of Lowe's hospitalization prior to the sheriff's notices being returned. The returned notice did not provide any evidence that the public records were incorrect and that Lowe was residing at a hospital and not at the Property address. Thus, Apex exercised due diligence and was not required to send additional notices.

CONCLUSION

The Public Guardian's Petition For Writ Of Certiorari and all other relief should be denied.

Respectfully submitted,

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April 17, 2006

MOTION FILED

FEB 16 2006

(1)

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APEX TAX INVESTMENTS, INC. AND JOHN HERNDON,
Respondents.

*On Petition for Writ of Certiorari to the
Supreme Court of Illinois*

MOTION FOR LEAVE TO FILE

and

**BRIEF *AMICUS CURIAE* ON BEHALF OF THE MENTAL
HEALTH ASSOCIATION IN ILLINOIS AND THE METAL
HEALTH PROJECT OF THE UNIVERSITY OF CHICAGO
LAW SCHOOL**

EDWIN F. MANDEL LEGAL AID CLINIC

**IN SUPPORT OF THE PETITION FOR A WRIT OF
CERTIORARI BY THE ESTATE OF MARY LOWE**

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*On Petition for Writ of Certiorari to the
Supreme Court of Illinois*

**Motion for leave to file a brief *amicus curiae*
in support of the petition for a writ of certiorari
by the Estate of Mary Lowe**

Amici, the Mental Health Association in Illinois ("MHAI") and the Mental Health Project of the University of Chicago Law School's Edwin F. Mandel Legal Aid Clinic ("the Mental Health Project") file this motion for leave to file a brief *amicus curiae* in support of the petition for certiorari. Consent was obtained from Mr. Barry Sullivan, counsel for the Petitioner, the Estate of Mary Lowe, and is attached. Ms. Denise Brewer,

counsel for the Respondent, John Herndon, has withheld consent.¹

Amici state the following reasons in support of this motion:

1. The legal rule at issue in the case at bar has the potential to affect the lives of persons with mental illnesses across the United States.
2. MHAI and the Mental Health Project are uniquely situated to inform the Court regarding the impact this case is likely to have on the lives of persons with mental illnesses.
3. MHAI is an affiliate of the National Mental Health Association and is comprised of mental health professionals, current and former consumers of mental health services, their family members, and concerned citizens. MHAI is a primary source of referral and educational material for a wide variety of people, from family members to mental health professionals and legislators.
4. The Mental Health Project has provided legal counsel to persons with mental illnesses for over twenty-five years and seeks to improve the law as it relates to persons with mental

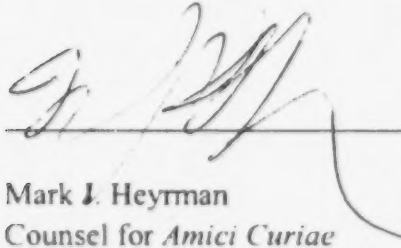
¹ Apex Tax Investments, though named in the case, did not appear in the Supreme Court of Illinois.

illnesses. It also seeks to improve the treatment of persons with mental illnesses, both inside and outside mental health facilities.

5. With its broad experience in the field of mental health law, Amici will explain to the Court how this case fits within mental health law generally, as well as how it fits within this Court's precedent regarding persons with mental illnesses.

WHEREFORE, Amici respectfully request that the Court allow this brief *amicus curiae* to be filed in support of the petition for certiorari.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Mark J. Heyrman', is written over a horizontal line. The signature is fluid and cursive.

Mark J. Heyrman
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In the Supreme Court of the United States

I hereby grant my consent to the **Mental Health Association of Illinois and the Mental Health Project at the University of Chicago Mandel Legal Aid Clinic** to submit an *amicus curiae* brief in the Petition for a Writ of Certiorari to the Supreme Court of Illinois in the case of:

ESTATE OF MARY LOWE, BY ROBERT F. HARRIS, COOK COUNTY PUBLIC
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v.

APEX TAX INVESTMENTS, INC. AND JOHN HERNDON,

Respondents

Signed,

Randy Sullivan

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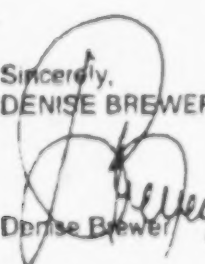
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RE: *Petition for Writ of Certiorari*
In the United States Supreme Court
File Number: 05-912
Our File Number: 220050

Dear Counsel:

In response to your January 27, 2006 letter regarding the filing of an *amicus curiae* brief in the above referenced matter, please file your motion for leave to file the brief in accordance with United States Supreme Court Rule 37(2)(b).

Sincerely,
DENISE BREWER & ASSOCIATES


Denise Brewer

NO. 05-912

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INTEREST OF THE AMICUS CURIAE

Petitioner, the Estate of Mary Lowe, seeks a writ of certiorari to the Supreme Court of Illinois. Amici,² the Mental Health Association in Illinois ("MHAI") and the Mental Health Project of the University of Chicago Law School's Edwin F. Mandel Legal Aid Clinic ("the Mental Health Project") support the petition for certiorari due to its significant impact on persons with mental illnesses not only in Illinois, but throughout the United States. MHAI is an affiliate of the National Mental Health Association. Comprised of mental health professionals, current and former consumers of mental health services, their family members, and concerned citizens, MHAI's goal is to promote mental health, prevent mental illness, and improve the law relating to people with mental illness. MHAI is a primary source of referral and educational material for a wide variety of people, from family members to mental health professionals and legislators. The Mental Health Project has provided legal counsel to persons

² This brief was not authored in any part by a party to the proceeding. No person or entity other than Amici made a monetary contribution to the preparation or submission of this brief.

with mental illnesses for over twenty-five years. It seeks to improve the law as it relates to persons with mental illnesses, and it works to better the treatment of persons with mental illnesses, both inside and outside mental health facilities. Amici seek to explain how the case at bar fits generally within the context of mental health law and specifically within this Court's precedents regarding persons with mental illnesses. Amici will also describe how persons with mental illnesses will be deleteriously affected if the decision of the Supreme Court of Illinois is allowed to stand.

SUMMARY OF THE ARGUMENT

The decision of the Supreme Court of Illinois conflicts with this Court's due process precedent. If it is allowed to stand, persons with mental illnesses will not be afforded due process of law in property forfeiture proceedings. When a person responsible for giving notice in a tax sale or property forfeiture proceeding has constructive notice of a property owner's mental incapacity and/or confinement in a mental hospital, special protections should be invoked. Such special protections, along with special restrictions, are afforded widely in the law, and this situation should be no different. Without special protections for persons with mental